

SAINT LUCIA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)



CASE NOS. SLUCRD2020/0058 & 0059A

BETWEEN

CPL 708 SHERVON MATTHEW

And

FRANCIS BERTIE

Defendant

APPEARANCES:

Ms Isa Cyril, Crown Counsel for the Prosecution

Mr Lorne Theophilus of Counsel (*amicus* at the court's request) for the Defendant

2022: December 2

2023: January 18

DECISION

Introduction/Background

- [1] **PHILLIP, J:** This defendant, Francis Bertie, was arrested and jointly charged with Marzia Lisa Jules and Dian Polimis with (1) conspiracy to commit the crime of extortion and (2) extortion, contrary respectively to sections 73 and 284 (1) of the Criminal Code¹ (the Code), and was brought before the First District Court on 29th January 2020. The defendant's bail was denied upon objection by the prosecution under section 593 (1) (a) & (b) and remanded to the Bordelais Correctional Facility (BCF).
- [2] The subsequent orders on the court's file dated 22nd October 2021, 26th November 2021, 3rd December 2021, 17th December 2021 and 18th February 2022 all merely adjourned the case to the next date. The matter came up for a sufficiency hearing on each occasion, and the defendant was unrepresented. Still, the court's file reveals: the police case file was filed on 7111 August 2020, and on 13th October 2021, the defendant was served with the sufficiency hearing submissions filed on 27th September 2021 for the sufficiency hearing scheduled for 22nd October 2021.

¹ Cap 3.01, of the Revised Laws of Saint Lucia 2013

- [3] On 18th February 2022, when the matter came up for the sufficiency hearing, the defendant was absent and unrepresented. The BCF indicated he was unavailable, but the prosecution could not proceed with the sufficiency hearing. The matter was adjourned to 28th February 2022 for the sufficiency hearing and for the prosecution to show cause why they should not pay costs for the requested adjournment.
- [4] On 28th February 2022, the prosecution indicated their intent to file notices of discontinuance regarding the co-defendants, Marzia Lisa Jules and Dian Polimis, and proceed only against the defendant. The court adjourned the matter to 3rd May 2022 for the sufficiency hearing relating to the defendant and ordered that the notices of discontinuance mentioned before be filed by 7th March 2022. The matter next came up before the court on 6th May 2022, as the 3rd May 2022 was a non-sit day for the court. Still, the court merely adjourned it to 17th June 2022, which turned out to be another non-sit court day.
- [5] Pursuant to an application filed on 24th March 2022, on 30th March 2022, the court ordered the defendant to be delivered by the BCF for conducting an identification procedure on 31st March 2022 with the defendant.
- [6] The matter eventually came up on 6th July 2022. The defendant complained about the delay in prosecuting his case and being on remand without a clear indication of his case's completion. The prosecution indicated the delay in completing the sufficiency hearing is due to the lack of cooperation in conducting an identification procedure with a former co-defendant against whom the prosecution discontinued the charges. The court ordered that the prosecution shall file and serve the sufficiency hearing submissions by 20th July 2022 and adjourned the matter to 29th July 2022 for the sufficiency hearing or for the prosecution to show cause why the defendant should not be discharged from these charges against him.
- [7] On 11th July 2022, the prosecution filed another application for the defendant's delivery by BCF for an identification procedure on 28th July 2022, which order the court granted on 25th July 2022. Consequently, on 29th July 2022, when the matter came up, the prosecution had not filed the sufficiency hearing submissions. Still, the prosecution indicated that the police recently conducted the identification procedure with a former co-defendant. They await the report and require more time to complete the sufficiency.

- [8] The court requested learned Counsel, Mr Theophilus, to assist the defendant, and made the following order. That, among other things, the prosecution shall disclose to him the police case file by 5th August 2022, the defendant may file any appropriate application(s) with submissions by 29th August 2022, and the prosecution shall file a response with submissions by 19th September 2022. The matter was adjourned for further consideration to 12th October 2022.
- [9] On 12th October 2022, the prosecution had not completed the disclosure as the defendant's counsel had not received the disclosure of the case file as ordered on the last occasion, nor had they filed sufficiency hearing submissions. Still, they indicated that the officer conducting the identification procedure report was filed today but not yet served. Hence, they required more time to complete the sufficiency. The court renewed the orders made on 29th July 2022 with new timelines and adjourned the matter for further consideration to 7th November 2022.
- [10] When the matter next came up on 7th and 25th November 2022, the defendant's counsel indicated he received the disclosure but did not respond regarding the sufficiency hearing as he was out of the jurisdiction on business and personal matters. He requested time to do so. The case was ultimately adjourned for further consideration to 2nd December 2022. On 1st December 2022, the defendant's counsel filed a response to the only sufficiency hearing submissions filed in the case on 27th September 2021.
- [11] This chronology (as per the court's file) raises the question of whether the prosecution has complied with the Criminal Procedure Rules (CPR) 2015² for holding a sufficiency hearing and whether it is still permissible to have them do so at this stage of the proceedings.

The Law

- [12] The advent of the CPR in 2015 brought with it a new regime for conducting indictable criminal matters in Saint Lucia. Previously these matters commenced in the District Court, where the magistrate heard the preliminary inquiry to determine if there was a case for trial before a judge and jury in the High Court. However, the CPR seeks to introduce a seamless proactive process for conducting criminal trials. Key new features of the CPR are its overriding objectives and case management (including sufficiency hearing for indictable matters in the High Court) provisions. These provisions are directly relevant to the court's consideration of the abovementioned issue (para [11]).

² Statutory Instrument. No. 22 of 2015 (wef 15th March 2015)

[13] Part 1 - Overriding Objective of the CPR provides:

"1.1 - (1) The overriding objective of these Rules is to enable the court to deal with criminal cases justly.

(2) Dealing with a criminal case justly includes -

- (a) dealing with a case efficiently and expeditiously;
- (b) dealing with a prosecution and a defence fairly;
- (c) respecting the interests of witnesses, victims and jurors;
- (d) ensuring that appropriate information is available to the court when bail and sentence are considered; and
- (e) dealing with a case in a way that takes into account-
 - (i) the gravity of the offence alleged;
 - (ii) the complexity of the issues;
 - (iii) the severity of the consequences for the defendant and others affected: and
 - (iv) the needs of other cases.

(3) The overriding objective of these Rules, particularly the timely and efficient disposal of cases in the Criminal Division, cannot be achieved by the court readily granting adjournments without the party requesting the adjournment showing cause.

1.2-(1) Each party must -

- (a) prepare and conduct the case in accordance with the overriding objective;
- (b) comply with these Rules, practice directions and directions made by the court;
- (c) immediately inform the court and all other parties of any failure to-
 - (i) take any procedural step required by these Rules;
 - (ii) follow any practice direction or any direction of the court;
- (d) promptly inform the court and the other party or parties of anything that may affect the date of trial or the progress of the case in any way;
- (e) take every reasonable step to make sure his or her witnesses will attend court when they are needed;
- (D) monitor compliance with directions;
- (g) ensure that the court is kept informed of events that may affect the progress of a case;
- (h) ensure that he or she can be contacted promptly about a case during ordinary business hours;
- (i) act promptly and reasonably in response to communications about a case; and
- U) if his or her legal practitioner on record will be unavailable for a scheduled hearing, appoint a substitute legal practitioner for that purpose and inform the other party or parties.

1.3 The Court must further the overriding objective, in particular, when -

- (a) exercising any power given to it by legislation;
- (b) applying any practice direction; or
- (c) interpreting any rule or practice direction."

[14] While Part 10 - Indictable Case Movement - Initial hearing to trial, states in part:

·**10.1** The date of the initial hearing of the complaint shall be the summons return date or a date as soon as possible after arrest unless the defendant has not been granted bail in which case, the initial hearing shall be scheduled for a date within 96 hours of arrest.

10.2-(1) At the conclusion of the initial hearing for an indictable offence, the Criminal Division Manager shall transmit to the Director of Public Prosecutions copies of all relevant documents, as requested by the Director of Public Prosecutions.

Note: See Part 6 on initial hearings.

(2) The Criminal Division Manager shall transmit to the Director of Public Prosecutions a copy of the Notice of Acting entered by the legal practitioner for the defendant or shall notify the Director of Public Prosecutions if the notice has not been entered in accordance with the Scheduling Order.

10.3-(1) Within sixty days of the initial hearing, or such other reasonable time fixed by Order of the Court, a sufficiency hearing shall be held before a judge or master to determine if the prosecution has disclosed sufficient evidence to meet the burden of going forward with the criminal prosecution and thereby to require the defendant to stand trial before a judge and jury.

(2) At the sufficiency hearing a judge or master shall examine only such documentary evidence as the prosecution may submit including, but not limited to, the complaint, police investigation reports, and victim and witness statements.

(3) The prosecution shall provide to the defendant, not less than seven days before the date of the sufficiency hearing, copies of all documents he or she intends to use at the sufficiency hearing.

(4) The documentary evidence submitted by the prosecution must disclose *prima facie* evidence that an indictable offence has been committed and that the defendant has committed it.

(5) The probative value of the documentary evidence submitted by the prosecution must be sufficient for the Court to find as a matter of law that a jury, taking the evidence in the light most favourable to the prosecution, could return a verdict of guilty against the defendant.

(6) Where a defendant does not have legal representation at a sufficiency hearing, the Court shall cause all documentary evidence submitted by the prosecution to be tendered by being read out aloud, except where the Court directs otherwise.

(7) The sufficiency hearing shall be attended by the prosecutor, police investigators, the defendant, and the legal practitioner for the defence, if any.

(8) At the conclusion of the sufficiency hearing the legal practitioners representing the parties may make submissions.

(9) A sufficiency hearing shall be held in open Court unless -

(a) a provision of the Criminal Code, Cap.3.01 or these Rules provide otherwise: or

(b) the circumstances require confidentiality as to certain charges, in which case the proceedings shall be held in chambers.

(10) If the Court finds that the prosecution has met its burden, it shall commit the defendant to stand trial, and if it finds that the prosecution has not met its burden, it shall discharge the defendant.

10.4-(1)

Submissions

- [15] Counsel for the defendant submitted that since this case is an indictable matter, CPR 10.3 (1) states that within 60 days of the initial hearing or other reasonable time fixed by court order, a sufficiency hearing shall be held before a judge or a master. CPR 10.3 (2) states that at the sufficiency hearing a judge or master shall examine only such documentary evidence as the prosecution may submit. It is irrefutable that the time prescribed for the sufficiency hearing in CPR 10.3 (1) has long elapsed. On this basis, the defendant can apply to the court for dismissal, as it breaches a safeguard created by statute for the protection of individuals, especially those denied bail for the offences they were before the court.
- [16] Further, the record of the file disclosed at the time of the sufficiency hearing reflects that no identification procedure was conducted concerning the defendant as mandated by the Evidence Act. The use of the words 'shall' in CPR 10.3 (2) indicates that the statute mandates both the time frame for holding a sufficiency hearing and the information upon which the court can rely to conclude whether a *prima facie* case exists.
- [17] The defendant's counsel submitted that the court exercises discretion in determining the fairness of proceedings. After evaluating the evidence in the file and the flagrant breach of CPR 10.3 (1), this honourable court must dismiss the cases against the defendant.
- [18] Counsel for the prosecution indicated that there were three defendants initially. Then the prosecution withdrew against the other defendants on 7th March 2022. The prosecution filed the statements of the former co-defendants on 16th February 2022, stating the defendant committed the offences charged. However, it appears the defendant was not served with these statements. The difficulty with the case was that there was no identification procedure conducted. Still, counsel submitted there is no prerequisite for an identification procedure at the sufficiency hearing stage.

Discussions

- [19] Clearly, CPR 10.1 and 10.3 prescribe the timeline for conducting a sufficiency hearing, as in the case of the defendant, to be 64 days from the date of arrest. The defendant was arrested and charged on 29th January 2020, almost three years ago. Indeed, CPR 10.3 allows the court to extend the time for the sufficiency hearing to such other reasonable time. Still, in so doing, CPR 1.3 (a) calls into play the furtherance of the overriding objectives. It means dealing with the cases justly and fairly. That is to say, dealing with the cases efficiently and

expeditiously, dealing with the prosecution and defence fairly, and respecting the interests of players or participants in the case.³

[20] Therefore, the protracted delay and the multiple adjournments of the sufficiency hearing at the prosecution's request are inimical to the overriding objective of the CPR to deal with the cases justly. Equally, it is contrary to the prosecution's duty to prepare and conduct the case following the overriding objective and to comply with these Rules, practice directions and directions made by the court. The prosecution must manage their witnesses to ensure they can prepare and present their case adequately and promptly. It is part of their duty to the court and the defendant as officers of justice under our adversarial criminal legal system based on the presumption of innocence and a fair trial within a reasonable time.⁴ It may sometimes mean having to be forceful with witnesses or, on occasion, taking the difficult decision of deciding it is unable to proceed with the case at the time.

[21] Further, CPR 10.3 (5) sets the standard of proof required of the prosecution's evidence to establish their case at a sufficiency hearing. The evidence must be of a probative value that a jury taking it in its most valuable light, may convict the defendant. This must mean that the court considers evidence capable of being adduced before a jury at the trial. Therefore, I disagree with the submission of the prosecution in this regard. Critical in this regard was the absence of evidence identifying the defendant as having committed the offences. This is so, notwithstanding the witness statements of the former co-defendants filed on 16th February 2022 purportedly identifying the defendant as having committed the crimes charged. That evidence would still not have been admissible without first complying with section 100 of the Evidence Act. Moreover, the defendant's counsel indicated that the prosecution did not serve those witness statements and that of the identification officer on the defendant following CPR 10.3 (3).

[22] Alternatively, it appears that the conduct of this matter may well be an abuse of process that brings the integrity of the criminal justice system into disrepute and warrants the protection of the court.⁵ Still, I make no definitive finding on this point, as it is unnecessary to determine the matter.

³ See CPR10.3 (2)

⁴ Section 8 of the Constitution of Saint Lucia, CAP 1.01 of the Revised Laws of Saint Lucia 2013

⁵ See Blackstone's Criminal Practice, 2020. Oxford University Press, paragraphs 03.67, et seq.

Conclusion

[23] Consequently, this court cannot properly extend the time for holding the sufficiency hearing by granting further adjournments so that the prosecution may get it right. This would be contrary to fairness and justice, particularly as the defendant was remanded for most of this time. Therefore, IT IS ORDERED THAT the defendant is discharged regarding the charges of conspiracy to commit the crime of extortion and extortion as proffered against him on 29th January 2020.

Justice Rohan A Phillip
High Court Judge

By the Court
Dp. Registrar