IN THE HIGH COURT OF JUSTICE

CRIMINAL DIVISION PORT OF SPAIN

CR-HC-POS-IND-418-2021-1

THE STATE

V.

KEVON PIPER AKA BACKHOE

REPRESENTATION:
Mr. Chase Pegus appeared for the accused.

Ms. Charmaine Samuel appeared for the State.

BEFORE THE HONOURABLE MADAME JUSTICE NALINI SINGH
Dated the 19th April 2024.

Ruling

Introduction

1. Rule 3.1 of **The Criminal Procedure Rules, 2023** (CrimPR) provides that the overriding objective of the rules is to deal with criminal matters justly. The facets of dealing with a criminal matter justly are expanded upon in Rule 3.3[1] of the CrimPR. Rule 3.3(d) in particular, requires that criminal matters be dealt with "efficiently and expeditiously".

2. In the context of case management, dealing with a case "efficiently and expeditiously" entails minimizing unnecessary delays and ensuring that the case moves forward promptly while still allowing adequate time for each party to prepare to present their case at trial[2]. At its core is a recognition that the Court's time is not only an invaluable resource, it is also a finite one and every unnecessary adjournment compounds the pressure on a system that is already stretched to its limits by competing demands. Every unnecessary adjournment means that witnesses must wait longer for their day in court. Accused persons, some of whom are in custody, must fall in line and wait for their trial date. Consequently, the judicious management and control of the Court's time are essential.

The Facts

3. The accused, Kevon Piper also known as Backhoe is indicted for the offence of Rape contrary to **section 4 (1) of the Sexual Offences Act Chap. 11:28 as amended**. The incident is alleged to have occurred in 2011.

4. On the 19th of May 2021, defence counsel was appointed by the Legal Aid and Advisory to represent the interest of the accused. Subsequently, on the 28th of September 2021, the Court

[1] Rule 3.3 states that: Dealing with a criminal matter justly includes–

- (a) dealing with the prosecution and the defence fairly;
- (b) ensuring the protection of all the rights of an accused person;
- (c) considering the interests of the accused, witnesses, victims and jurors and keeping them informed of the progress of the matter, as necessary;
- (d) dealing with the matter efficiently and expeditiously;
- (e) ensuring that appropriate information is available to the Court, particularly when bail or sentence is under consideration; and
- (f) dealing with the matter in ways that take into account–
  - (i) the gravity of the offence;
  - (ii) the complexity of what is in issue;
  - (iii) the consequences for an accused and others who may be affected;
  - (iv) the needs of other matters; and allotting to the matter an appropriate share of the Court's resources, while taking into account the need to allot resources to other matters.

[2] Assuming it is a case that cannot be determined without proceeding to trial.

issued an order directing defence counsel to write to the State to request disclosure. The State was given until the 28th of October 2021 to complete disclosure.

5. This deadline was not met. Indeed, nearly five months after the October 2021 deadline had passed, the State still hadn't shared with defence counsel the results of a DNA test they planned to use as evidence in the trial.

6. In light of these circumstances, on the 8th of March 2022, the Court issued a clear directive to the State, instructing them to disclose the DNA test results by the 14th of March 2022. Case management was then adjourned to the 28th of April 2022. However, on this date, the State not only failed to comply with the Court's directive but also made a surprising request for the accused to provide a new non-invasive sample for comparison purposes, as the previously provided sample could not be located. The Court acceded to the State's request.

7. Following the Court's order, the State proceeded to take nearly a year to contact the complainant to instruct him to arrange for the accused to provide the sample. And so, it was only on the 1st of May 2023, that the Court received confirmation that arrangements were made and the accused provided the sample to the State. Consequently, case management was adjourned to the 31st of May 2023, to facilitate the testing and disclosure of the results to defence counsel.

8. By the end of May 2023, the DNA results remained undisclosed. On the 29th of June 2023, the Court was informed that the test was never done as the Forensic Science Centre did not have the necessary reagent to facilitate the testing. State Counsel assured the Court that the chemical was back in stock and the test would be conducted in short order. To move the matter along, the Court mandated the State to disclose the results of the said test by the 21st of July 2023.

9. At a case management hearing on the 24th of July 2023, it came to light that the State had yet to fulfil the directive to disclose the DNA test results to defence counsel. It was at this juncture that the Court ordered the State to disclose the results of the DNA test by the 4th of September 2023 and if same was not disclosed by this date, the State would be precluded from relying on it at the trial.

10. Even after this specific directive, non-compliance continued and on the 4th of September 2023, the Court was informed that disclosure of the DNA test remained outstanding. In fact, the State told the Court that they did not even possess the results and were still awaiting them from the Forensic Science Centre.

11. 1At this point, the Court reminded itself of the CrimPR 7.5(2)(f) which allows a court to extend a time limit fixed by a direction –even after that time limit has expired. The Court was also mindful of the approach taken in **R v. Musone [2007] EWCA Crim 1237** where the issue before the Court of Appeal was whether the trial judge had correctly rejected the attempt by one accused to adduce evidence of the previous bad character of the other after breaching the time-limit which was set for service of a notice of an application to adduce such evidence. It was held that the trial judge was entitled to exclude that evidence where he concluded that the first-named accused was deliberately manipulating the process so as to prevent the second-named accused from dealing with the evidence properly. In their considered view, it would be rare for a judge to exclude evidence of substantial probative value just because the time limits had not been complied with. Having said this, however, the Court of Appeal went on to opine that it would be proper to do so where such exclusion was the only means to ensure fairness. In the headnote of the case this is what is said:

> "…the overriding objective of the 2005 Rules, as stated in rule 1.1, was that criminal cases be dealt with justly and, by rule 1.2, each participant in the conduct of each case had to conduct the case in accordance with the overriding objective, which could not be achieved if a court had no power to prevent a deliberate manipulation of the rules by refusing to admit evidence which it was sought to adduce in deliberate breach of those rules; that, although a court should be most reluctant to exclude evidence of substantial probative value by reason of a breach of the procedural code, there would be cases where the only way in which the court could ensure fairness was by excluding such evidence; that a judge, when deciding whether to exclude such evidence in circumstances where the rules had been deliberately breached, was entitled to take into account the fact that

the evidence was improbable and unlikely to be believed; that the requirements of a fair trial for all defendants…"

With these considerations in mind, the Court extended the time to the 18th of September 2023 for the State to disclose the DNA results.

12. On the 18th of September 2023 however, the Court was confronted with the reality that after two years from its initial order, the State continued to breach the Court's order to disclose the DNA results to defence counsel. At this juncture, the Court decided to set a final deadline for disclosure. This was necessitated by the need to ensure the integrity of the legal process and the need to uphold the rights of the accused to a fair trial in light of the State's persistent failure to adhere to previous directives. The Court issued an ultimatum: the State must disclose the results by 9:10 am on the 22nd of September 2023. Failure to do so would result in the State being barred from relying on the test in the trial.

13. At 8:30 am on the 22nd of September 2023, the State emailed to defence counsel an unsigned, unstamped document headed "Certificate of Analysis". Upon receipt of this document, Defence Counsel Mr. Pegus emailed the Court stating that:

> "… it is assumed that the said unsigned, unstamped certificate of analysis is the said certificate of analysis the state intends to rely on at the trial of this matter. At this stage the defence reserves the right to address the Honourable Court on the admissibility of the "certificate of analysis" disclosed. Further, we wish to respectfully place on record that we intend to object to any attempt by Counsel for the prosecution to disclose any other version of the DNA results".

14. 1On the 27th of September 2023, the State emailed to defence counsel the signed and stamped Certificate of Analysis. This prompted Defence Counsel to email the Court indicating that:

> "The defence objects to the late disclosure of this certificate of analysis having regard to the court's latest order…".

The Issue

15. The issue to be determined is whether the State should be allowed to tender into evidence, the signed and stamped certificate of analysis which was disclosed to defence counsel on the 27th of September 2023.

The Arguments of Counsel

The Position of the Defence

16. Defence Counsel contended that the State should not be allowed to rely on the signed and stamped Certificate of Analysis disclosed on the 27th of September 2023. Key reasons provided by Defence Counsel included the following:

i. The signed and stamped Certificate of Analysis was disclosed after the sanction took effect;

ii. There is currently no application for an extension of time before the court.

17. Counsel argued that the Court possesses inherent jurisdiction, thereby enabling it to issue orders for the progression of the case. Consequently, the Court also holds the authority to modify any previously issued order, provided there exists a legitimate rationale for such variation. Given the absence of an application for an extension of time to disclose the signed and stamped Certificate of Analysis, there is no valid basis for the Court to permit the State to rely on the Certificate disclosed on the 27th of September 2023.

18. Defence Counsel urged the Court to consider the approach taken in the case of **R v. Boardman [2015] EWCA Crim 175.** This is a case where the issue was whether the judge's case management powers could justify the exclusion of late-served prosecution evidence. Among the issues considered in the case was the overriding objective of the CPR in England. Though this case can be distinguished on its facts, Defence Counsel argued that its dicta can be used to inform our jurisprudence in circumstances where the court makes an order imposing a sanction in the criminal jurisdiction. Reliance was placed particularly on paragraphs 37 and 38 where Sir Brian Leveson P reading the judgement of the court stated the following:

> "[37] It is now ten years since the decision in R v. Jisl [2004] EWCA Crim 464 in which Judge LJ (as he then was) emphasised that case management

> was “an essential part of the judge’s duty”. Referring to the issue of trial preparation and the objective of “greater efficiency and better use of limited resources”, he went on (at para 118 to state that) “When trial judges act in accordance with these principles, the directions they give . . . in the exercise of their case management responsibilities, will be supported in this court. Criticism is more likely to be addressed to those who ignore them.”
>
> [38] The directions at the Plea and Case Management hearing were plain; the CPS were not entitled to expect that no sanction would follow unless the case had been brought back to the court for a further order: the resources of the court cannot be expected necessarily to extend to what might be described as the provision of a “yellow card”. Obviously, every case will depend on its own facts but the willingness of this court to support trial judges in the exercise of their discretion in discharging these responsibilities is equally clear in cases of this nature.”

19. Defence Counsel argued that the approach taken in the case of *R v. Boardman (supra)* supports the contention of the defence. As such, the State is not entitled to expect that no sanction would follow unless they made an application for an extension of time.

20. It was further submitted that the State should have, at the very least, informed the court in writing from as early as the 22nd of September 2023 that they would seek to rely on another version of the Certificate of Analysis which was disclosed to the Defence -especially in light of the Defence’s prompt indications which were communicated to the Court when the first Certificate of Analysis was disclosed on the 22nd of September 2023. Instead, according to Defence Counsel, the State “proceeded with confidence to simply and unceremoniously disclose a later Certificate of Analysis without seeking an extension”. In counsel’s view, the only conclusion to be drawn from the State’s conduct was that they may have treated the situation in such a manner on the assumption that the Court would simply allow them to rely on the later Certificate of Analysis.

21. In these circumstances, Defence Counsel urged the Court not to endorse such a casual approach to an order of the Court.

The Position of the State

22. 2The State submits that there was no failure on the part of the State to comply with the Court's Order of the 18th of September 2023. Their position is that there was compliance with the Court's order and the disclosure which was made on the 27th of September 2023 was permissible following the "preliminary disclosure" of the unsigned and unstamped document.

23. It was further submitted that the unsigned Certificate of Analysis and the signed Certificate of Analysis are the same document. The contents and substance contained in the five-page documents are the same. They both contain the Letter Head of Forensic Science Centre and the same laboratory case number is set out on both documents. Further, the same information and the date the swabs were received as well as the analysis which was performed involving the buccal s2wabs of the accused and the previous swabs of the virtual complainant are also contained in both documents. Additionally, both Certificates of Analysis, bear the same date which is the 22nd of September 2023 and the initials "MJ". It is therefore submitted that the State should be allowed to rely on the signed and stamped Certificate of Analysis.

24. Regarding the case of *R v. Boardman (supra)* upon which the defence relied, the State's position is that this case is entirely inapplicable as the court in that matter did not make any disclosure order which was not complied with.

25. The State concluded by submitting that this matter was not approached casually.

The Law

26. In determining whether evidence should be excluded as a consequence of the breach of the rules, I have had regard to the case of **R (Robinson) v. Sutton Coldfield Magistrates' Court [2006] EWHC 307 (Admin)**. This was a case where the Divisional Court had to grapple with a notice of intention to adduce bad character evidence which was made out of time. The prosecution applied for the justices to exercise their discretion under Crim PR 35.8 to extend time and allow

the notice to stand. A submission had been made that such an extension should only be granted in exceptional circumstances. The Divisional Court rejected that fetter on the discretion of the court, preferring the formulation that in the exercise of its discretion, a court must take account of all relevant considerations, including the furtherance of the overriding objective. Owen J., with whom Hallett LJ. agreed, went on to say:

> "15 In this case there were two principal material considerations: first the reason for the failure to comply with the rules. As to that a party seeking an extension must plainly explain the reasons for its failure. Secondly, there was the question of whether the Claimant's position was prejudiced by the failure.
>
> 16 . . . A party seeking an extension cannot expect the indulgence of the court unless it clearly sets out the reasons why it is seeking that indulgence. But importantly, I am entirely satisfied that there was no conceivable prejudice to the Claimant . . . .". (emphasis mine)

27. Similarly, in *R v. Musone (supra)* Moses LJ. said:

> "37 The Act . . . gives power to the judge to prevent that which, in the judge's assessment might cause incurable unfairness either to the prosecution or to a fellow Defendant. Plainly, the procedural rules should not be used to discipline one who has failed to comply with them in circumstances where unfairness to others may be cured and where the interests of justice would otherwise require the evidence to be admitted. But, there will be cases in which the judge can properly deploy [the provision], not merely as a matter of discipline but to prevent substantial unfairness which cannot be cured by an adjournment."

28. **R v. Delay [2006] EWCA Crim 1110** is another case to which I have had regard. This case looked at two questions before deciding whether evidence should be excluded as a consequence of the breach of the rules. One matter was whether the other parties had been prejudiced by the late notice of the application. The second was the reasons for the delay.

29. Admittedly, these cases all relate to notice of a bad character application, but this Court notes that the same approach has been taken in relation to the consequences of failures to comply with the rules in other areas. So in **R v. Ensor [2009] EWCA Crim 2519**, there was a failure of the defence to comply with the notice requirements for expert evidence and this resulted in the exclusion of that evidence.

30. These cases suggest that when faced with the question of deciding whether evidence should be excluded as a consequence of a breach of the rules, a court must consider two questions. They are:

i. whether the other party is prejudiced by the late compliance, and;

ii. the reasons for the delay in compliance with the Court's directive.

Analysis

31. Although these observations have not been made specifically in the same context as that which has given rise to this application, it is equally germane to the issue to be resolved by this Court. What the authorities have made pellucidly clear, is that the decision to exclude evidence based on the breach of the rules will depend ultimately on a close scrutiny of the circumstances of the matter at bar to ensure that unfairness is avoided. Having regard to the legal propositions I return to the facts of the matter at hand.

i. Whether the accused is prejudiced by the late disclosure

32. The document provided by the State on the 22nd of September 2023, mirrors the document disclosed on the 27th of September 2023, with the exception of two minor details. Notably, the second document disclosed post-deadline bears both a Forensics Science Centre stamp and, it is signed by the scientific officer under whose hand the document was issued.

33. With this in mind, I have considered the fact that there is a consistency in information between both documents. While the second document may contain additional details such as a stamp and signature, the core information remains unchanged from the first document. Both documents contain the same findings or results from the forensic analysis. Therefore, the accused

is not now forced to grapple with any new substantive information that could significantly impact his defence.

34. The second matter I have considered is that allowing the State to tender the second document in evidence at the trial will have no material impact on the fairness of the proceedings. The inclusion of the stamp and signature in the second document does not alter the substance of the document or the evidence it presents. These details primarily serve administrative or procedural purposes, rather than affecting the factual content or implications of the evidence. Thus, the accused's ability to understand and respond to the evidence is not compromised.

35. Another matter I have considered is that although the second document was disclosed seven days after the Court's 22nd of September 2023 deadline, the accused is in receipt of the complete information before the trial. Further, at the suggestion of defence counsel, no direction has yet been given by the Court to the defence to file its defence statement. This means that should the Court allow the State to use the signed and stamped Certificate of Analysis at trial, the accused still has sufficient time to review and analyse the second document before his defence statement is prepared and filed, and so, the delay in disclosure of the second document may not unfairly prejudice his case from this perspective.

36. The final matter to which I have addressed my mind is the fact that should the signed and stamped Certificate of Analysis be admitted as evidence at the trial, the accused will still have an opportunity to challenge the weight to be attached to this document. If the accused believes that the inclusion of the stamp and signature materially affects his defence, he will still have the opportunity to canvass all the facts surrounding the disclosure of the first document and the late disclosure of the second document during trial proceedings. This will ensure that the accused's rights are protected as any concerns regarding the fairness of the State relying in this second document, will be fully set out before the jury for their consideration.

37. I therefore conclude that while the delayed disclosure of the second document may present an inconvenience to the accused, it will not result in unfairness to the accused if the State is permitted to rely on the second document as evidence in the trial.

38. Moving now to the second limb.

ii. The reasons for the delay in compliance with the Court's directive

39. The State's delay in disclosing the second document to defence counsel can be attributed to three key factors which are known to the Court.

40. Firstly, there was a significant lapse in communication between relevant authorities regarding the need for a second sample from the accused for DNA testing. It took the State seven months to realize this necessity, highlighting a clear breakdown in communication channels between the State's legal team, the police complainant and the Forensic Science Centre.

41. Additionally, upon obtaining the order for the accused to provide the sample, the State took nearly a year before they could make contact with the police complainant so that he could put things in place to facilitate the taking of the non-invasive sample from the accused. The obligation that existed between the police complainant and the State's legal team to remain engaged throughout the case was disregarded, which further contributed to the delay.

42. Thirdly, the State faced logistical challenges due to a shortage of essential reagents at the Forensic Science Centre, impeding the completion of the required testing. This external factor added to the delay in processing the document and disclosing it to defence counsel.

43. The combination of these factors contributed to the State's delay in disclosing the document to defence counsel.

44. The CrimPR defines a "participant" as anyone involved in any way with the conduct of a criminal case, matter or proceeding. Rule 3.5(2) deals with the duty of participants in a criminal case to prepare and conduct the matter in accordance with the overriding objective, and to comply with the rules and directions that the court makes. This obligation was stressed by the Court of Appeal in **R v. Phillips [2007] EWCA Crim 1042**, when Clarke J said at paragraph 37 that:

> "not only must judges be robust in their case management decisions … but
> the parties who are ordered to take steps must take them".

This requires that all stakeholders work together in a very real way to have matters progress through the system in a timely manner and it starts with establishing a clear line of interdepartmental communication. The State's delay in this matter underscores the critical need for effective interdepartmental communication and proactive engagement by all stakeholders to ensure the timely progression of criminal cases.

45. The question which remains to be answered in light of the foregoing, is whether the State should be precluded from admitting the second document into evidence at the trial. In my judgment the defence has not demonstrated prejudice and the State has explained the delay.

46. Before moving to the Order of the Court in this case, parties would do well to note the sentiments of Judge LJ. in **R v. Jisl [2004] EWCA Crim 696** where at paragraphs 116 to 118 his Lordship warned that:

> "Active, hands on, case management, both pre-trial and throughout the trial itself, is now regarded as an essential part of the judge's duty. The profession must understand that this has become and will remain part of the normal trial process, and that cases must be prepared and conducted accordingly …".

Order

1. **The State is not precluded from relying at trial on the signed and stamped Certificate of Analysis which was disclosed to defence counsel on the 27th of September 2023.**

2. **In light of the one year and eleven month delay caused by the State in completing disclosure, it is hereby ordered that if the accused is found guilty, his sentence is to be automatically reduced by one year and eleven months. This is separate and apart from the application of any other sentencing principle.**

47. While I have not precluded the State from relying on the signed and stamped Certificate of Analysis, it is imperative that State Counsel understand that the Court's patience regarding protracted delay in completing disclosure obligations is not unlimited. The public interest, as well

as the broader interests of justice, may soon become paramount considerations if it becomes apparent that a pattern of non-compliance has emerged without appropriate efforts to rectify it.

48. My remarks are to be brought to the attention of the Director of the Public Prosecution, the Director of the Forensic Science Centre and the Commissioner of Police, for immediate action to be taken to ensure compliance with court time lines in the future.

Nalini Singh
Judge